# AN INVENTORY & REVIEW OF EXISTING MASSACHUSETTS LAWS & REGULATIONS PERTAINING TO THE CREATION OF A STORMWATER UTILITY

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## INTRODUCTION

A stormwater utility is not a new idea. Municipalities have had statutory authority since the mid-19th century to operate wastewater systems and to establish a set of fees and capital assessments to pay for the cost of operating and constructing such systems. In older systems such as the one in Chicopee, wastewater systems combine the transport and treatment of sewage and stormwater. Newer systems transport stormwater and sewage in separate systems.

In their role as provider of wastewater services, municipalities act as public utilities. They are the sole providers of such services, adhere to rate methods prescribed by legislation, are required to provide the service to any property owner requesting it, and are subject to state regulation over how the services are performed.

What is new in the stormwater field are programs that involve correction of stormwater quality problems at the source through non-structural measures, such as regulation to minimize impervious surfaces in new construction and improved material handling and parking lot sweeping in existing developments, and through structural measures, such as the treatment of stormwater through grassy swails and wet ponds that facilitate infiltration. What is also new are the imposition of fees and assessments related specifically to the amount of stormwater runoff and based upon each property owner's relative amount of impervious surface.

These new approaches for addressing stormwater concerns and charging for their implementation raise the following question: Can we fit the new stormwater program (including funding mechanisms) under the traditional separate wastewater and stormwater programs and the combined system programs, or a "home rule" adaptation of these programs, or must we expand the state and local authority by amending existing legislation and adopting a new ordinance?

In the following report, we demonstrate that not only is there a lack of express authority to require infiltration practices and to charge property owners on their respective amounts of impervious surfaces, there are a number of current statutory provisions that conflict with these new stormwater approaches. This leads to our recommendation that new legislation is required. Also, we conclude that municipalities must adopt new ordinances in order to establish a stormwater connection permit program, to add stormwater-based assessment formulas, and to establish a stormwater utility and enumerate its powers.

Our report is broken down as follows: Task 1: review of existing laws describing, first, wastewater programs, second, drinking water programs (included in Appendixes I and II), and, third, methods for raising revenue for these programs; Task 2: legal analysis, examining, first, "home rule" authority and, second, authority to adopt a new fee and assessment structure; Task 3: providing, first, a rationale for the

new legislation and ordinances and, second, preliminary drafts of same; and Task 4: providing an outline of presentation to the Legislative Committee. While the report has general application to all communities in Massachusetts, it has a special focus and relevance to the City of Chicopee.

## TASK 1: INVENTORY AND REVIEW OF EXISTING LAWS AND REGULATIONS

### I. DISPOSAL OF SANITARY WASTE AND STORMWATER

#### A. Historic Development

The State Legislature has authorized municipalities to lay out, construct, maintain and operate a system of common sewers and main drains in public or private ways as the municipalities "adjudge necessary for public convenience or the public health." G.L. c. 83 §1 ¶1. The system encompasses connections and other works, as well as sewage treatment and disposal. Id. §1 ¶1 and §6.

#### B. Sanitary Wastewater v. Stormwater

A "common sewer" is considered a sanitary sewer that carries sewage. Sewage includes wastewater from homes, public buildings and commercial or industrial establishments as well as surface and groundwater.[1] Id. §1. A "main drain" is one not used for sewage, but is used for combined street runoff and drainage from adjoining land. Bates v. Westborough, 151 Mass. 174 (1890). As reflected in these definitions, Chapter 83 encompasses separate sanitary outfalls (SSO), separate storm systems (SSS), and combined systems including combined system outfalls (CSO).[2]

#### C. Municipal Authority

(1) Sewage

The city council, selectmen, sewer commissioners or road commissioners may acquire property and easements across property by eminent domain or purchase that are necessary for the systems of common sewers (as well as main drains) and Publicly Owned Treatment Works (POTW). Id. §§1 and 6. The board or officers of a municipality having charge of the repair and maintenance of sewers, if requested by an owner who pays for the cost, or if ordered by the Board of Health, must construct connecting sewers within the limits of the street and building sewers to tie a house or business to the common sewer. Id. §§1, 3 and 11.

Section 7 of Chapter 83 authorizes DEP to eliminate any nuisance caused by a defective POTW. In this connection, DEP may order an enlargement or improvement to the POTW, or may prohibit industrial waste or other material that interferes with the operation of the POTW from entering the plant, or may require pretreatment before such industrial waste or other material is allowed to enter the plant. Sections 1 and 3 grant the courts jurisdiction to restrain the unlawful use of common sewers and to restrain discharges found unlawful under Section 10.

Section 43 of Chapter 21 states expressly that any state regulation over the discharge of sewerage does not supersede the powers of municipalities to enact and enforce sewer ordinances and to issue permits for sewer connections.

G.L. c. 40 §21, ¶10 authorizes municipalities to adopt ordinances to regulate the use of common

[1] G.L. c. 111 §17, which authorizes DEP to approve municipal systems, follows a different set of definitions: "drainage" means "rainfall, surface and subsoil water only; and "sewage" means "domestic and manufacturing filth and refuse."

[2] However, a drain constructed to handle runoff from a catchbasin to a stream is not a main drain within the meaning of G.L. c. 83, §1. Blaisdell v. Stoneham, 229 Mass. 563 (1918). Also see, Delamaine v. Revere, 229 Mass. 403 (1918).

sewers and to prohibit discharges that would interfere with proper operation of the sewerage system and the treatment and disposal works.

(2) Stormwater

Municipalities may construct and maintain connecting drains to property owners for stormwater drainage. G.L. c. 83 §1. Highway officials may construct ditches or drains to drain any street and carry water away from the street across other land to a pond or stream. Id. §4. The Board of Health may require abutters to repair any private drain located in a private or public way. Id. §12. Once a city or town builds separate systems for the transport of water and sewage, property owners must connect wastewater discharge to the sewer; and stormwater runoff, to the drain. Id. §5.

### D. Recent Developments

In March 1997, the Department of Environmental Protection adopted Stormwater Management Standards (SMS) for new development and redevelopment projects. The SMSs are being implemented by local Conservation Commissions under the Wetlands Protection Act. To illustrate, Number 4 of the SMSs calls for removal of 80% Total Suspended Solids (TSS).

The SMSs rely upon Site Planning and Non-Structural Approaches (SPNSA) and Structural Best Management Practices (BMPs). Examples of SPNSA's are minimization of impervious surfaces, regular implementation of parking lot sweeping and catch basin cleaning, reduction of use of pesticides, and public education. Examples of BMPs that are constructed include stormwater wetlands, grassy swales, and sand and organic filters.

SMS's may be required in Discharge Permits under the State Clean Water Act as set forth in DEP's Stormwater Policy Handbook. While SPNSA's and BMPs have been incorporated in some subdivision regulations and zoning ordinances, to our knowledge they have not been included in wastewater ordinances and regulations.

### E. Local Regulation-Chicopee

Chicopee has adopted a Subdivision Regulation under G.L. c. 41, 81Q. Sections 402.1, 402.2, and 403.2 of the Subdivision Regulation require developers to submit to the Planning Board their proposed surface drainage system, drainage calculations, and plans. Section 508.1 and the August 31, 1978 amendment provide for storm drainage criteria. These criteria apply to flooding concerns - the traditional subject of early subdivision regulations.

While Section 509.0 controls erosion and sedimentation from construction activities, this Subdivision Regulation does not require SMSs, as described in the state stormwater program. For example, developers are not required to maximize natural infiltration and use BMPs to remove sediment.

## II. CHARGING FOR THE COST OF SANITARY AND STORMWATER PROGRAMS

### A. Introduction

In the prior section, we discussed the existing authority of municipalities to implement wastewater programs. In this section, we will examine the authority of municipalities to set fees and assessments to pay for wastewater programs.

### B. Assessment Methods

Sections 14-29 of Chapter 83 cover assessments for sewer and drain costs and imposition of liens for non-payment of such charges. Section 14 authorizes the appropriate local official to assess any person for both a connection to a main drain and a common sewer a proportional part of the charge of making or

repairing the drain or sewer as well as further extensions. This assessment applies not only to persons who tie into the new main drain but also to any person "who by remote means receives benefits thereby for draining his land or buildings." This include persons who own property that abuts the stormwater main drain but has chosen not to connect to it or who owns undeveloped property. See Stepan Chemical Co. v. Wilmington, 8 Mass. App. Ct. 880 (1979). In other words, the Legislature has authorized municipalities to assess the cost of a stormwater system on property owners who directly, or have the potential benefit, from such system.

### C. Methods By Which Towns May Allocate the Construction Costs of Main Drains and Common Sewers

Municipalities have been authorized to follow three options for assessments under Sections 14, 15, 18 and 23. Specifically, costs may be recovered using: (1) a fixed uniform rate, Id., 15, (2) a uniform unit method, Id. §15, or (3) a permanent privilege charge, Id. § 17. While these options are available for "sewers," in light of the reference at the beginning of Section 15 to assessments made under Section 14, which encompasses pipes that carry stormwater and sewage, and the express authority in Section 18 to select a method of assessment for laying main drains or common sewers, we conclude that the assessment options apply to stormwater as well as to sanitary related work. Moreover, Section 18 authorizes the combined use of the several methods for assessment.

#### 1. Assessment Based On Fixed Uniform Rate (FUR)

The FUR is the estimated average cost of all sewers and drains within the system according to the frontage of the land on any street or way in which the sewer is located, according to the area of land within a fixed depth from the street or way, or according to both frontage and area. However, no assessment can be made to a property if by reason of grade or level it cannot be drained into the sewer until the incapacity is removed. Id. §15.

#### 2. Assessment Based on Uniform Unit Method (UUM)

The UUM is based upon sewer and drain construction costs divided among the total number of existing and potential "sewer units" to be served after apportioning the costs of general and special benefit facilities.[3] Id. A "sewer unit" equals a single family residence. Buildings with multifamily, commercial, industrial and semipublic uses are converted into sewer units by using residential equivalents. Id.

#### 3. Assessment of Potential Development

Under Section 15, a portion of the costs of the general benefit facilities (i.e., force mains) may be apportioned by the uniform unit method on all areas to receive benefits within the pumping district or a combination of districts Id. ¶4. The uniform method of assessment applies to both existing and potential structures. Id. §15 ¶3. Existing and potential multifamily, commercial, industrial and semipublic uses will be converted into sewer units on the basis of residential equivalents. Id. The number of sewer units for a potential structure is to be calculated on the basis of zoning then in effect. Id. But, the cost of general benefit facilities attributable to undeveloped land not abutting a sewered street may not be assessed until properties are serviced by public sewerage. Id. ¶4.

The statute also allows municipalities, "from time to time," to redetermine the uniform rate fixed charge

[3] General benefit facilities include force mains, trunk mains, and pumping stations. Special benefit facilities include sewer mains serving adjacent facilities. G.L. c. 83 § 15. Through ordinance or by-law, municipalities may separate the costs of general benefit facilities from those of special benefit facilities.

for sewer construction costs. Id. § 15A. Municipalities may extend the time for the payment of the assessment on an undeveloped parcel "for a fixed time," but interest of 4% per annum must be paid annually upon the assessment from the time the assessment was made. Id. §19. Once the land is developed, the assessment must be paid within three months or at the expiration of the town's "fixed time." Id.

#### 4. Charge for Permanent Sewer Privileges

Instead of charging assessments using either of the methods discussed above, municipalities may require sewer and drain users to pay for permanent privileges for their estates. Id. § 17. These privilege amounts must be reasonable, and are determined by the aldermen, sewer commissioners, selectmen or road commissioners. Id.

Property owners who paid assessments for the original construction of a sewer line, can be assessed again under Section 17 for a replacement sewer. Seiler v. Hingham, 353 Mass. 452 (1968).

### D. Methods By Which Municipalities MayAllocate the Cost of Constructing Individual Sewer Lines

Municipalities may appropriate money for connecting certain estates to common sewers. The municipalities may issue bonds or notes to pay for such connections and assess property owners for amounts necessary to pay off the bonds or notes.

Moreover, municipalities may require landowners to pay in advance an amount equal to the estimated assessment of the connection, and any overpayment is returned to the landowners. Id. § 24.

Property owners benefited by a sewer line "from the common sewer to the boundary of the street" must pay the town for the permanent privilege of using the line. Id. The aldermen, sewer commissioners, selectmen or road commissioners determine the amount to be paid based on the estimated average cost of all such particular sewers within the territory for which a system of sewers has been built or adopted. Id.

### E. Annual Charges

Municipalities are permitted to apply "just and equitable" annual charges or fees for the use of common sewers to every person who enters the sewer. This charge may cover maintenance and repair or "any debt contracted for sewer purposes." Id. § 16. Contrasted with the broader coverage in Section 14 that includes main drain and common sewers, the annual charge provision of Section 16 applies only to common sewers.

## TASK 2:LEGAL ANALYSIS

### I. HOME RULE AUTHORITY

The Home Rule Amendment to the State Constitution adopted in 1966 divides authority to adopt legislation between the State Legislature and municipal legislative bodies. Mass. Constitution, Amend. Art. 2. The State Legislature has the exclusive power to levy, assess and collect taxes. Id. § 7. The State Legislature has also retained the authority to pass laws pertaining to two or more municipalities and to pass special acts pertaining to a single municipality by two-thirds vote, or if filed by petition by such municipality. Id. § 8.

The Supreme Judicial Court (SJC) has confirmed that the Home Rule Amendment preserves the State Legislature's right to legislate with respect to state, regional and general matters, even though the action may have special effects on one or more individual municipalities. Clean Harbor of Braintree v. Board of Health of Braintree, 415 Mass. 876, 616 NE2d 78 (1993).

A municipality may, by adoption of a by-law or ordinance, exercise any power which the State Legislature has the power to confer upon it, which is not inconsistent with the constitution or laws enacted by the Legislature "in conformity with powers reserved to" the State Legislature by Section 8, and which is not denied by its Charter. Id. § 6.

The SJC will "review the delegation of lawmaking power to the city in light of the policy underlying the home rule amendment that "maximum elbow-room [be provided] for localities in solving local problems on their own initiative." Opinion of the Justices, 427 Mass. 1211, 1216 (1998) quoting, First Report of the Special Commission on Implementation of the Municipal Home Rule Amendment to the State Constitution, 1966 Senate Doc. No. 846, at 18. In fact, the State Legislature has conferred upon municipalities the power to adopt ordinances to carry out traditional "police power" functions of government. G.L. c. 40 §21(1).

An important case in the sanitary wastewater and stormwater field is Hadley v. Amherst, 372 Mass. 46 (1977). A 1912 statute authorized Amherst to "lay out, construct, maintain and operate a system or systems of main drains and common sewers" and gave the board of sewer commissioners the right to take or purchase land in Amherst and the Town of Hadley necessary for that purpose. Hadley requested that the statute be nullified under Section 9 of the Home Rule Amendment. In denying Hadley's request, the Court held that legislation concerning water quality is "within the ambit of retained legislative power" and that sewer systems "are a matter of State, regional, or general concern, and thus an area in which the legislature retained law-making authority." However, it does not follow from this case that municipalities are precluded from also adopting ordinances to regulate sanitary and stormwater systems as long as they are not in conflict with state law.

## II. SETTING OF STORMWATER FEES AND BETTERMENTS

### A. Fee vs. Tax

Governmentally imposed charges fall into one of two categories — taxes or fees. Both must be authorized by the State Legislature. The distinction is important because if a charge is a tax it must be authorized exclusively by the State Legislature. Mass. Constitution, Part I, Art 23; Amendment Article 2, § 7. Further, if taxes are imposed by the State Legislature, they must be "proportional and reasonable". Mass. Constitution, Part II, C.1, §1, Article 4. Property taxes must be levied "proportionately in the same class", Id., and are limited by Proposition 2_. Moreover, certain charitable entities are exempt from paying property taxes. G.L. c. 59 §5.

Under early case law, the SJC found a sewer charge was unconstitutional because the charge was not founded on special benefit. Sears v. Street Commissioners of Boston, 173 Mass. 350, 53 NE 876 (1899). Later, in Emerson College v. City of Boston, 391 Mass. 415 (1984), the SJC treated in more comprehensive fashion the tax vs. fee issue. Pursuant to a Special Act of the State Legislature, Boston charged certain large non-residential building owners for augmented fire services availability (AFSA). The Fire Department increased the AFSA for a property if additional personnel and equipment were deemed necessary to extinguish any fire and to ensure the safety of the occupants; and decreased the AFSA if fire suppression and detection equipment were present.

The SJC found that the City had correctly refrained from arguing that the charges were special assessments. Assessments are imposed for local improvements. The SJC stated that maintenance of additional fire companies "necessary to extinguish fires at various buildings throughout Boston is not a local improvement." Id. P. 416, Note 5.

The SJC applied the following four factors in deciding whether the charge was to be upheld as a fee:

(1) The AFSA charge must be set at a level to enable the City to recover the cost of providing AFSA protection;

(2) The charge must be sufficiently particularized as to justify distribution of the costs among a limited group (i.e., the users or beneficiaries of the services), rather than the general public. Id. P. 425;

(3) The AFSA charge must be voluntary, i.e., the owner can refuse the service for which the charge is made; and

(4) The AFSA charges collected must be used exclusively to pay for the extra services.

The SJC found that factor no. 1 was satisfied, but factor nos. 2, 3 and 4 were not. On factor no. 2, the SJC found that the extra service was designed not just to safeguard a building, but also to safeguard its occupants and to prevent the spread of fire. On factor no. 3, the SJC found that the owner must accept the extra service. On factor no. 4, the AFSA charges collected went to support not just the additional fire companies, but also for general police and fire services and for the general fund of the City.

With the City not having satisfied three out of four of the factors, the SJC held that the AFSA charge did not conform to any "constitutionally permissible form of monetary exaction."

In a subsequent case where the issue related to the legality of a fee charged for laying a water pipe, the Court of Appeals, distinguishing the Emerson decision, held that the fee was not a tax. Morton vs. Town of Hanover, 43 Mass. App. Ct. 197 (1997). In this case, the Board of Public Works (BPW) had authority by special act to fix just and equitable rates for the use of water. The rate assessed against a group of commercial businesses was based half on assessed property valuation and half on water usage in amounts necessary to pay off bonds issued by the Town. The Court declared that the "rates are valid if they are not 'taxes,' and were established according to lawful procedure, and also are 'just and equitable.'" Id. P. 199.

On the tax vs. fee issue, the Court applied the Emerson College criteria. First, the Court asks whether the installation of a new 16 inch pipe (for which the fee was charged to certain commercial property owners) benefited those property owners who were assessed the fees. While the property owners in question still relied on an older pipe, the Court found that the introduction of new pipes in the system allowed for an increased flow and pressure in the existing pipes that were relied upon by those property owners.

Regarding compliance with the other criteria from the Emerson case, the Court granted the Town its Motion for Summary Judgment. The Court held that (1) since water rates do provide a private benefit, they do not have to be voluntary; and (2) by definition water rates are not used for general revenue purposes.

On the fairness of the rate, the Court stated that the Town did not have to look alone to the quantity of water used. The Court applied a reasonableness test and even quoted another Massachusetts decision that some discrimination of rates is permissible within reasonable limits.

In Bertone v. DPU, 411 Mass. 536, 583 NE2d 828 (1992), the Hull Municipal Lighting Plant charged a hook-up fee to a customer seeking new or expanded service. The fee was necessary to expand its system to accommodate higher peak loads. A new condominium developer contended that the fee was an unlawful tax.

The Court held that the Emerson criteria were satisfied. First, the services are "sufficiently particularized." The service to old customers remains the same, and the new customers receive the benefit of the expanded service. Second, the Bertones are not "compelled" to pay the fee. They do not have to build the condominium project. Last, the fees will be applied to the cost of the new construction and not used for more general purposes.

In Berry v. Danvers, 34 Mass. App. Ct. 507, 613 NE2d 108 (1993), the Danvers Water and Sewer Commission set a sewer connection fee of $4 for each gallon of sewage. The Court of Appeals upheld a lower court ruling that the fee was an unlawful tax because it represented money to be used to upgrade the

entire system and not just to benefit new users.

The Berry decision can be contrasted to Winthrop v. Winthrop Housing Authority, 27 Mass. App. Ct. 645, 541, NE2d 582 (1989). In Winthrop, the Town charged an annual sewer use fee to all landowners to cover the operation and maintenance of the sewer system. Because the fee benefited those required to pay the fee, it was upheld as a fee, not a tax.

## TASK 3: NEW LEGISLATION AND ORDINANCE

### I. Gaps in the Stormwater Program[4]

A. Implementation

Based on the above review of Chapter 83, it is evident that the State Legislature has prescribed the municipal authority to implement and finance sanitary and stormwater systems. As stated in Hadley v. Amherst, such systems are properly a matter of concern by the State, and the Legislature has retained the power to regulate municipal activity in this field. Under the Home Rule Amendment, solely on the question of the scope of Chicopee's Stormwater Program, it can be argued that Chicopee may authorize and operate a program that simply amplifies or expands upon the municipal authority defined in Chapter 83, but such program cannot conflict with Chapter 83.

Chapter 83 imposes considerably greater control over sanitary and combined sanitary-stormwater flows than over control over stormwater flows.

(1) Sanitary and Combined Flows

As reviewed above, Boards of Health can require hook-ups; and local sewer departments, connection permits and pretreatment. POTWs are authorized. Municipalities can establish annual charges. G.L. c. 83 §16.

(2) Stormwater Flows

Municipalities lack authority to require environmental-type connection permits and pretreatment of stormwater discharges. Municipalities have only the limited power (i) to prohibit the obstruction of flow of a separate stormwater system (SSS), Id. §9; and (ii) to require repair of a private drain in a public or private way. Id. §12. They do not have explicit authority to regulate the use of stormwater drains and to establish annual charges.

In its present form, Chapter 83 does not expressly allow municipalities to regulate the quality of stormwater entering the SSS, nor the manner of collecting or infiltrating of stormwater on private property. Nor are municipalities authorized to build treatment facilities solely for stormwater (but only stormwater in combination with sewage).

However, as discussed below, municipalities in their planning and regulatory roles through site plan and subdivision plan review may have certain of these powers.

### B. Financing

Sections 14-29 of Chapter 83 authorize an assessment setting system to pay for both sanitary and stormwater systems. In certain sections, Chapter 83 references only common sewers (i.e., those handling

[4] See "Controlling Stormwater in Wisconsin: Municipal Considerations and Strategies" by Laurie Kobza, 2 Wis. Envtl. L.J.1, Winter 1995.

sanitary flows). However, by referencing main drains (i.e., those handling stormwater flows) in the introductory as well as later sections, the Legislature states its intent to include funding measures for both sanitary and stormwater systems (and combined systems). This means that Chicopee has the authority to assess costs related to its stormwater system to property owners who are benefited by such system.

In many respects, stormwater rates are similar to water/sewer rates. In both cases, the rates are assessed on property owners who connect to the respective water/sewer and stormwater systems by pipes tied to their properties. If looked upon in this way, the stormwater system provides a private benefit to its customers, not a public benefit.

Typically, volume of use is one measure for setting the fee. For water/sewer fees, it is quantity of water used, and for stormwater fees, it is the amount of impervious surface. The latter translates into a measure of the amount of water discharging off the property.

Of course, some of the activities in stormwater programs, such as public education, are of general public benefit to citizens who are interested in having improved water quality in the streams and rivers of their communities. Yet, this type of service is similar to services typically performed by water-type utilities such as public education around water conservation. Further, if the stormwater program involves a charge assessed on all property owners, then such charge, following the decision in the Winthrop case, is assessed substantially to the class of people who benefit from the stormwater program.

The difficulty arises when we try to apply any of the three options for assessments set forth in G.L. c.83 §15 to the stormwater program. Under FUR, assessing fees on the basis of lot frontage or depth does not equitably relate to the apportionment of stormwater program expenses. Under UUM, we begin with a single family resident as a single unit. This achieves "rough justice" in the stormwater field assuming most single family properties in Chicopee are comparable in terms of impervious surface. But how many residential units are assigned to a commercial property? Also, Section 15 assumes a maximum build-out allowed under zoning.

There is a better alternative for the stormwater field. As discussed in the accompanying report by the Pioneer Valley Planning Commission (PVPC), one could assume that a residential unit on average had 2,000 sq. ft. of impervious surface. Then a commercial property with 10,000 sq. ft. of impervious surface would be assigned five residential units.

Can we mold a stormwater utility fee system under the existing statute or do we need explicit authority to allow an assessment based on amount of impervious surface? Possibly municipalities can rely upon an annual sewer user charge. G.L. c. 83, §16. But that may be limited to sanitary sewers and to a gallonage based charge. Certainly, the restrictive assessment options do not apply to an impervious surface based rate. Given the restrictive definition of the existing assessment and fee options, we conclude state legislation is required.

### C. Other Opportunities

G.L. c. 83 §15 distinguishes general and special benefit facilities. This could be applied to stormwater related expenditures. For example, those property owners who benefit from a new storm drain in their street could be made responsible collectively for that expenditure by calling it a special benefit facility. Under the holding in Bertone, a stormwater utility can charge a property owner who proposes to expand its facilities a fee to pay for the expanded stormwater system.

### D. Other Issues

Chicopee is undertaking work to separate sanitary and stormwater flows. Whether this work should be paid for by sanitary or stormwater related assessments or fees presents an important fiscal issue for the City.

## II. OPTIONS FOR CHANGES TO LOCAL ORDINANCES

### A. Subdivision and Zoning Approaches

The Proposed Stormwater Management Draft Ordinance resents a starting point. The question is how a comprehensive approach reflected in the draft could be applied to existing uses as well as to new development. For new development subject to subdivision plan approval, the criteria such as those in the Draft Ordinance can be added to Chicopee's Subdivision Regulation.

For projects requiring site plan approval, the performance standards and BMP requirements could be added to the Zoning Ordinance. See efforts to this effect in Site Plan Review Draft Ordinance, dated March 18, 1998. For smaller projects not requiring site plan approval, standards could be added to the zoning ordinance and be administered as part of the building permit application process.

### B. Sewer Ordinance

Existing uses not requiring subdivision plan, site plan, or building permit approval could be made subject to a properly authorized ordinance administered by the DPW or Stormwater Utility. The DPW or Stormwater Utility could demonstrate that since activities on private property have an adverse effect on the maintenance and operation of the CSO and SSO systems, they should be regulated.

In the attached draft ordinance, we have included regulations to this effect. The attached draft ordinance will change the following sections of Chapter 230 Sewers of the Chicopee Ordinance:

| | |
|---|---|
| §230-5 | Connecting Private Drains with Sewers - Add a main drain connection permit with conditions for achieving infiltration of stormwater on-site, maintaining and cleaning catchbasins, and other BMPs, etc. |
| §230-6 | Fees for sewer connections (meaning assessments) - Expand to include stormwater drain connections, but have special provision as follows: Substitute rate dependent on volume of stormwater entering the public system or natural waterbody measured by amount of impervious surface (to pay for upgrade necessary for system expansion) in place of fixed uniform rate based on amount of frontage. |
| §230-7 | Method of Assessment - See §230.6. [Special vs. general assessments.] |
| §230-8 | Rate of Assessment - Change from fifty cents ($.50) per foot of frontage to rate dependent upon amount of impervious surface. |
| §230-19 | Permit required for any sewer work - Make consistent with §230-5. |
| §230-30 | Discharge of Stormwater - Instead of allowing discharge of stormwater to natural outlet, require that stormwater be infiltrated to extent practical. |

## III. CONCLUSIONS

### A. Legislation

Municipalities with CSOs have authority to regulate discharges to the CSOs, reduce CSO volume, separate or close CSOs, and treat the combined sanitary/stormwater effluent. Specific assessment methods are also authorized. They include the "equivalent residential unit" (ERU) method employed in many stormwater programs throughout the country. However, the ERU method authorized in Chapter 83 does

not envision use of the amount of impervious surface as the key factor when deciding what number of ERUs should be assigned to a property.

While Chapter 83 authorizes the operation and construction of common drains, it does not specifically authorize stormwater treatment and requirements to infiltrate stormwater, to prevent erosion in construction areas, and to prevent future pollution. Moreover, in the case of municipalities with separate stormwater systems, certain activities including regulation over discharges of stormwater to the system and treatment of stormwater are not expressly authorized.

While DEP may have authority to regulate certain activities that are causing pollution of state waters, and Boards of Health may have authority to eliminate public health nuisances, local public works and sewer departments do not appear to have express statutory authority to conduct their own stormwater regulatory programs.

In the same way that additional stormwater functions have to be authorized, the setting and collecting of fees for these services must also be authorized. While it is true that there are now accepted ways of separately financing certain service functions at the municipal level through enterprise and revolving funds,[5] a stormwater utility represents an expanded municipal endeavor and should be explicitly authorized.

The need to have a separate utility is evident when the control of the stormwater function is separate from the control of wastewater function. A separate system conducted by a stormwater utility is necessary, for example, when a municipality does not conduct its own wastewater program because it is already part of a district wastewater utility.

In light of the above, **we recommend that legislation be filed to expand municipal authority to include the operation of a more comprehensive stormwater system.** While it could be argued that municipalities could rely on "home rule" authority, since the State Legislature has spelled out in detail the operation and financing elements for sanitary and stormwater systems (as well as combined systems), it is advisable to pursue the State legislative route when it is necessary to change those details. The new legislation will:

1) authorize the establishment of stormwater utilities,
2) assign enforcement authority to the local DPW,
3) authorize stormwater connection permits,
4) clarify that an assessment and annual fee system based on the amount of impervious surface can be used, and
5) will change the existing formula so that property owners pay less, and not more, for leaving property undeveloped.

In this connection, we have provided a preliminary draft of the proposed legislation.

**B. Ordinance**

As Chicopee develops its stormwater management program, there are advantages in developing a comprehensive ordinance. The rationale for the program is explained. The responsibility for accomplishing the different parts of the stormwater program is defined. Those ordinances that were designed for the wastewater system will be distinguished from the new ordinance applicable to the stormwater program. For example, no longer will assessments be based on present and future development size, but instead be based on amount of impervious surface. The ordinance will explain how rates are calculated and collected and how revenues will be used. Having the ordinance will satisfy EPA's and DEP's requirements for demon-

[5] See Appendix III.

stration of specific legal authority to run programs and carry out enforcement measures and will demonstrate that the assessment formula is fair and reasonable. Last, there is the benefit of engaging the support of the community behind the stormwater program through adoption of the ordinance by the Board of Aldermen.

In this connection, we have provided a preliminary draft of the proposed ordinance.

## TASK 4: PRESENTATION TO LEGISLATIVE COMMITTEE

### I. Federal Requirements

Commencing September 1999 Phase II of the Federal stormwater program will apply to smaller communities with municipal separate storm sewer systems (MS4) in urban areas. It will subject municipalities to a stormwater general permit (GP) or to a watershed related general permit. Requirements of the GP will include: (a) application of best management practices (BMP); (b) adoption of a stormwater management plan; and (c) testing and reporting.

### II. STATE REQUIREMENTS

The state requirements are to be accomplished on a watershed basis.

From these efforts, municipalities will be expected to:

- select applicable BMPs;
- educate the public;
- review new construction and development;
- evaluate need for stormwater treatment;
- require property owners to maintain and upgrade retention/detention areas and catch basins and to eliminate improper connections to stormwater drains; and
- devise fee and assessment rates that serve as incentives to reduce the amount of impervious surface.

### III. EFFORTS NEEDED AT LOCAL LEVEL

Local stormwater programs must respond to problems relating to water quantity (i.e., flooding) and water quality.

Municipalities have experience in running wastewater programs and charging for administering such programs. Work by local Conservation Commissions in administering the state stormwater policies serves as precedent for local involvement in new stormwater initiatives. Building inspectors and local DPWs have traditionally dealt with stormwater issues.

Stormwater is a local issue. Solutions depend upon understanding local topographic, soil and hydrological conditions. The next important step is to provide better tools to municipalities and special districts.

## IV. METHODS FOR RAISING MONEY

There are advantages to using a system of stormwater fees to be charged to all property owners.

Accepted accounting vehicles, such as enterprise funds, are already in use. The utility concept applies logically to the stormwater program. It provides a dedicated and dependable funding source for the development of a stormwater program in compliance with federal and state regulations and local watershed goals.

Separating the stormwater charge from the wastewater charge makes sense because the stormwater charge represents a payment for solving a special problem. By having a special charge for stormwater programs based on amount of impervious surface, property owners have the incentive to reduce the amount of impervious surface. Moreover, benefits achieved from the stormwater program can be highlighted.

## V. NEED FOR NEW LEGISLATION

There is a need for express authority for municipalities to create stormwater utilities and to expand into a more comprehensive stormwater program. Current statutes were drafted without benefit of our current knowledge of effective stormwater programs. To pay for such stormwater initiatives from charges based on water usage or amount of development misses the mark. Property owner should pay based on their contribution to the problem. To do this, the relevant measure is amount of impervious surface within each property. In the same way, municipalities have authority to issue sewer connection permits, they should have authority to issue stormwater connection permits.

## VI. BENEFITS

- Water quality of watersheds will improve.
- Municipalities will come into compliance with federal and state requirements.
- Local property taxes are not increased.
- Municipalities will qualify for the federally assisted State Revolving Fund.

All benefited parties are included. For example, owners of tax-exempt property and government property owners join in paying for stormwater related services that benefit the entire community.

Property owners who discharge off their properties greater amounts of untreated stormwater will pay proportionately a greater amount of the costs of the stormwater program. Those who take steps to infiltrate stormwater will correspondingly have lesser fees to pay. The argument can be made that in the long run money will be saved. For example, most non-structural practices and even structural BMPs are low cost; today, repair of flood destroyed property and recovery of diminished fisheries are high cost.

In light of the growing interest in upgrading the state's watershed, communities will welcome having the option to establish stormwater utilities.

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## APPENDIX I: PROVISION OF DRINKING WATER

### A. Authority

Municipalities under G.L. c. 40, §39A or by special act may establish water supply systems.

### B. Water Pricing System

a. Municipality

For the purposes of water conservation, water resource management, water resource planning and comprehensive financial management, a municipality may adopt a pricing system which includes the costs of the provision of water and sewer services to the residents and industrial and commercial users of the municipality receiving said services. G.L. c. 40§39J. The definition of costs includes, but is not limited to, costs of pipe and related appurtenances, replacement stock for water and sewer, costs relating to replacement and repair including street work, maintenance of all equipment and related appurtenances necessary for the provision of water or the removal of wastewater services, all costs relating to the metering of water, all related costs of police and fire protection, all administrative costs relating to the collection of water and sewer fees, all costs of chemicals relating to the treatment of water and wastewater, all costs relating to the personnel of the departments, as well as any long term planning costs for the continued provision of the services, and any costs of land acquisition relating to long range planning and future water supply development or wastewater treatment facilities. Id.

Water Commissioners may regulate and fix and collect "just and equitable prices and rates for the use of water." G.L. c. 41 §69B. Income defrays all operating expenses, interest and payments of principal. Surpluses can be used for new construction. Id.

A municipality may assess an owner of property which receives benefit from the laying of water pipes in public or private ways upon which the owner's property abuts or which by more remote means receives benefit through the supply of water to the owners property, a proportionate part of the cost of extending such water supply to the property. G.L. c. 40 §42C. The municipality may apply a fixed uniform rate upon several parcels receiving benefit from the laying of water pipes based upon the estimated average cost for all water pipes accorded to the frontage of such land on any way in which the pipe is laid or according to the area of such land within a fixed depth from such a way, or according to valuation for purposes of taxation in the last annual assessment, or according to two or all of such measures. Id. §42H. These formulas apply only to limited areas and do not apply to a surcharge assessed for a new water main. Morton v. Hanover, 43 Mass. App. Ct. 921, 478 NE.9d 964 (1985). G.L. c.40, §42K provides:

> In a city, town or district which accepts the provisions of this section, the water commissioners may assess betterments in accordance with the provisions of chapter 80 for the construction and connection of water mains and services by a uniform unit method which shall be based upon the common main construction costs divided among the total number of existing and potential water

units to be served after having allocated the town contribution, if any, and after having proportioned the cost of special (specific unit) and general benefit facilities. Each water unit shall be equal to a single family residence. Potential water units shall be calculated on the basis of zoning in effect at the date of assessment. Existing and potentially and potentially multi-family, commercial, industrial and semi-public uses shall be converted into water units on the basis of residential equivalents.

Added by St. 1994, c 60, §66.

### C. Ordinances With Fee Formulas Not Expressly Authorized by the State Legislation are Ineffective

Municipalities can only assess charges for installation of water mains under statutory authority. Higgins v. City of Springfield, 20 Mass. App. Ct. 921, 478 NE2d 964 (1985). In this case, the Water Commissioners assessed a "front footage charge" to recoup the cost of the installation in 1959. G.L.c.40 §§426-42I authorized municipalities to assess charges for construction. But since Springfield did not accept the statutes until 1867, long after the water main was installed, and since it did not have authority by special act, the City did not have authority to assess construction charges for the water main in question. Possibly, a different result would be achieved under Home Rule.

## APPENDIX II. MODEL WATER AND SEWER COMMISSION

Chapter 40N of the General Laws provides a model law for the establishment of Water and Sewer Commissions. The purpose is to ensure an economical and efficient water system and sewer works system. G.L. c.40N §1. Self-sustaining fees, rates and charges are established; and all consumers, public and private, taxpayer and tax-exempt, shall pay their fair share of the costs of services. Id. §1.

Section 3 defines costs and current expenses broadly. Similarly, "revenues" have a broad reach and include "rates, fees, charges, rents and other receipts" from the operation of the system and "all other properties of the commission." Included are "bond receipts, proceeds of any grant or loan, investment earnings and proceeds of insurance condemnation, sale or other and disposition of properties." Id. §3. Last, the sewer works and water works systems have all inclusive definitions. Id.

The Commission is a separate entity and is a political subdivision of the Commonwealth. Id. §4. Powers are broadly enumerated. Id. §§8 and 9. Section 9 also requires that fees, rates, rents and assessments be established to provide revenues at least sufficient to cover enumerated costs. Section 9 provides for collection of fees, and establishment of liens, and authority to shut off water. All surpluses shall be applied to the next year's expenses or to reduce indebtedness. Id. §9. Section 9 empowers Commissions to issue bonds. Section 25 authorizes a group of municipalities to form regional water and sewer district commission with the approval of the Town Meeting or City Council.

## APPENDIX III. UTILITY PAYMENT VEHICLES

### A. Enterprise Fund

By vote of a City Council, cities may establish enterprise funds for a utility. G.L. c. 44 §53F1/2. The City Council must approve the budget for the utility and the City can raise in its tax levy any excess of expenses over the estimate of income to be derived from the operation of the utility.

Chapter 29C, Section 12 provides express authorization to set fees, enter into agreements and establish enterprise funds for the operation of water pollution abatement projects.

### B. Revolving Fund

Upon annual authorization, revolving funds can be established and maintained upon recommendation by the Mayor and vote of the City Council. G.L. c. 44 §53E 1/2. Expenditures may be made from the revolving fund without further appropriation.

### C. Fees

Chapter 40, Section 22F authorizes municipalities to fix reasonable fees. The fees can be authorized by a board or officer who issues permits or provides services to a class of persons. The entire proceeds from the fees remain with the issuing municipality. In the case of a board or officer appointed by an elected board, the fee must be approved by the elected board. Id.

Last, as an exception to the general rule that all funds received by a city must be paid into the general funds of the city treasury and subject to appropriation, fees provided for by statute can be directly spent for the purposes for which the fees were collected. G.L. c.44 §53.

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